No. 91-712

(18)

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a person whom the government forcibly abducts from abroad, without any attempt to invoke the relevant extradition treaty, has a right to be repatriated when the state from which he was abducted demands his return.

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BRIEF AMICUS CURIAE OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

The International Human Rights Law Group ("IHRLG") is a non-profit legal organization that promotes the observance of international human rights. Founded in 1978, the IHRLG

provides legal assistance and information on international human rights law and has Category II consultative status with the United Nations Economic and Social Council. In lawsuits raising questions of international human rights, the IHRLG provides legal advice with the assistance of private attorneys working on a pro bono basis. The IHRLG has obtained the written consent of the parties to file this brief.

SUMMARY OF ARGUMENT

Customary international law forbids one sovereign state from forcibly abducting a person from another sovereign state without the express or implied consent of that state. When the aggrieved state objects to the abduction and demands the return of the person, customary international law requires the

abducting state to return him. These principles are enforceable in the present case because customary international law is generally applicable in U.S. courts and these particular rules are not displaced by the Ker-Frisbie doctrine or otherwise. However, the Court need not reach these issues if it affirms the court of appeals' interpretation of the Extradition Treaty Between the United States of America and the United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656 (the "1980 Extradition Treaty"). The IHRLG here expresses no view on that issue.

ARGUMENT

I. THE UNITED STATES VIOLATED CUSTOMARY INTERNATIONAL LAW BY FORCIBLY ABDUCTING ALVAREZ-MACHAIN FROM MEXICO

Throughout this litigation, the parties and lower courts have focused on

whether the forcible abduction from Mexico, at the behest of the United States Government, of a Mexican citizen charged with U.S. federal crimes, violates the 1980 Extradition Treaty and requires his repatriation. This focus has obscured the fact that customary international law, wholly apart from any rights and remedies that may exist under the 1980 Extradition Treaty, prohibits such a forcible abduction and, given the Mexican diplomatic protest, requires Alvarez to be repatriated.

The customary international law prohibition on forcible abduction flows from the rule that "States must not perform acts of sovereignty within the territory of another State." 1 L. Oppenheim, International Law § 144b (H. Lauterpacht, 8th ed. 1955). This rule, like all rules of customary international law, "results from a general

and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of the Foreign Relations Law of the United States §102(2) (1987) ("Restatement"). The rule is well-established in the main sources of evidence of customary international law: decisions of international and national tribunals and scholarly writings.[1/] As for U.S.

1/ E.g., S.S. "Lotus" (Turkey v. France), [1927] P.C.I.J. (ser. A.) No. 10 at 18, in 2 M. Hudson, World Court Reports 20, 35 (1935) ("the first and foremost restriction imposed by international law upon a State is that -- failing the existence of a permissive rule to the contrary -- it may not exercise its powers in any form in the territory of another State"); F.A. Mann, Reflections on the Prosecution of Persons Abducted in Breach of International Law [hereinafter "Mann"], in International Law at a Time of Perplexity 407 (Y. Dinstein ed. 1989) ("[E]xercise of physical force by one State in the territory of another State without the latter's consent constitutes an excess of international jurisdiction or a violation of the 'principle of

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practice, the State Department has declared that "the Government of the United States cannot permit the exercise within the United States of the police power of any foreign government." 19 Department of State Bulletin 251 (1948).

"Thus, while a state may take certain measures of nonjudicial enforcement against a person in another state, . . . its law enforcement officers cannot arrest him in another state, and can engage in criminal investigation in that state only with that state's consent." Restatement § 432 comment b. Indeed, the Legal Adviser of the Department of State made precisely this point in testimony to Congress: "Forcible

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respect for State sovereignty'"); Restatement § 432 comment b ("It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent.").

abductions from a foreign State clearly violate this principle" requiring respect for sovereignty. FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 101st Cong., 1st Sess. 31 (1989) [hereinafter "House Oversight Hearing"] (prepared statement of Hon. Abraham Sofaer). Accord Mann at 407 ("A State which authorizes the abduction of a person from the territory of another sovereign state is guilty of a violation of public international law."); 1 H. Lauterpacht, International Law 488 (E. Lauterpacht ed. 1970).

There are, of course, many instances in which one state obtains custody of a person from abroad without violating the sovereignty of the rendering state. Most typically, this is done pursuant to an extradition treaty specifically

intended to permit one state to obtain persons from another state without sending agents there to conduct law enforcement activities in violation of international law. "[T]he principles of international law recognize no right to extradition apart from treaty." Factor v. Laubenheimer, 290 U.S. 276, 287 (1933). "It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the States where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another." United States v. Rauscher, 119 U.S. 407, 411 (1886).

Aside from formal extradition proceedings, a state may obtain the consent or even cooperation of the foreign state to seize a person in its

territory. Where consent in advance is not obtained, the states may reach agreement after the fact to settle differences arising from the act of one seizing a person from the territory of the other. See generally House Oversight Hearing at 33-34 (statement of Hon. Abraham Sofaer describing varieties of express and implied consent).

Agreement after the fact is perhaps best illustrated by Israel's 1960 abduction of Adolph Eichmann from Argentina. There, Argentina filed a formal complaint with the United Nations Security Council, which adopted, with no votes against, a resolution condemning the abduction and requesting "the Government of Israel to make appropriate reparation."[2/] The resolution "merely

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2/ The resolution, U.N. Doc. S/4349 (1960), reprinted in House Oversight Hearing at 81, stated in relevant part:

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recognized a long standing principle of international law that abductions by one state of persons located within the

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> The Security Council,
>
> Having examined the complaint that the transfer of Adolf Eichmann to the territory of Israel constitutes a violation of the sovereignty of the Argentine Republic,
>
> Considering that the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations,
>
> . . . .
>
> Noting that the repetition of acts such as that giving rise to this situation would involve a breach of the principles upon which international order is founded creating an atmosphere of insecurity and distrust incompatible with the preservation of peace,
>
> . . . .
>
> 2. Requests the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law. . . .

territory of another violate the territorial sovereignty of the second state and are redressable usually by the return of the person kidnapped." United States v. Toscanino, 500 F.2d 267, 278 (2d Cir. 1974). By the time of Eichmann's trial, however, the states had settled Argentina's claims at the diplomatic level, "resolv[ing] to regard as closed the incident which arose out of the action taken by citizens of Israel, which infringed fundamental rights of the State of Argentina." Attorney General v. Eichmann (Israel Dist. Ct. 1961) (quoting joint communiqué), reprinted in 36 Int'l L. Rep. 18, 59 (1968). "In these circumstances the accused cannot presume to speak, as it were, on behalf of Argentina and claim rights which that sovereign State had waived." Id. at 63, aff'd (Israel S. Ct. 1962), reprinted in

id. at 277, 305-06.

As discussed below at 39-44, all the U.S. caselaw on forcible abduction falls into some form of express or implied consent. None detracts in any way from the basic rule of customary international law that, in the absence of such consent, no state can forcibly abduct a person from another state, as the U.S. Government did here. See Pet. Br. at 2-4 (describing abduction).

II. THE REMEDY FOR A FORCIBLE ABDUCTION IN VIOLATION OF CUSTOMARY INTERNATIONAL LAW IS THE RETURN OF THE PERSON

When a state violates an international legal obligation to another state, the offending state must "terminate the violation and, ordinarily, . . . make reparation, including in appropriate circumstances restitution or compensation for loss or injury."

Restatement § 901. The remedy must "provide redress for the breach of the international obligation that gave rise to the claim. Ordinarily, emphasis is on forms of redress that will undo the effect of the violation, such as restoration of the status quo ante, restitution, or specific performance of an undertaking." Id. comment d.

The United States sought and obtained a judgment ordering restitution in the Iran hostages case before the International Court of Justice, United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24). There, the Court held the Iranian Government responsible for the seizure and detention in violation of the Vienna Conventions on Diplomatic and Consular Relations, a bilateral treaty, and customary international law. 1980 I.C.J. ¶90, at

42. Accordingly, the Court unanimously declared that the Iranian Government "must immediately take all steps to redress the situation," and in particular "must immediately terminate the unlawful detention of the United States Chargé d'affaires and other diplomatic and consular staff and other United States nationals now held hostage in Iran, and must release each and every one and entrust them to [the United States Government]." Id. ¶95, at 45.

For cases of forcible abduction in violation of state sovereignty, this general rule of remedies requires, when the aggrieved state protests, the release and repatriation of the person seized. Thus, the Restatement provides:

> If a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive

> reparation from the offending state. If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned. If the state from which the person was abducted does not demand his return, under the prevailing view the abducting state may proceed to prosecute him under its laws.

Restatement § 432 comment c (emphasis added). Similarly, Professor Mann states that "[t]he normal and generally accepted remedy in the event of a wrongful abduction is the return of the victim, i.e., restitution in kind." Mann at 411.

Of course, there are numerous cases in which courts have retained jurisdiction because local officials cooperated in the abduction,[3/] there was a

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3/ E.g., Ex parte Elliott, 1 All E.R. 373 (K.B. 1949) (arrest in Belgium by two British military officers accompanied by two Belgian police officers); The Savarkar Case (Feb. 24, 1911), reprinted in Hague Court Reports 275 (Scott ed. 1916)
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complete lack of protest,[4] or such protest as there was failed to meet domestic standards.[5]. Nevertheless, "[t]here are numerous cases in which the

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(arbitral panel holds France not to be entitled to the restitution of a British-Indian fugitive who had eluded British custody while on a ship docked in Marseilles and had been returned to British authorities by a French policeman).

4/ E.g., Afouneh v. Attorney-General, 10 Ann. Dig. 327 (Palestine S. Ct. 1942) (arrest in Syria by Palestine police); In re Károly, 4 Ann. Dig. 345 (Hungarian Minister of Justice 1928); R. v. Lopez and Sattler, 1 Dearsly & Bell's Crown Cases 525 (1858); Ex parte Scott, 9 Barn & C. 446 (1829) (arrest in Belgium by English police).

5/ E.g., 19 GGART 25 Verfahrenshindernis wegen Verletzung von Hoheitsrechten (German S. Ct.) reprinted in 1985 Neue Zeitschrift fur Strafrecht STZ 464 (arrest in the Netherlands by German police; note from the Dutch embassy did not meet the German Constitution's requirement that the foreign government formally object to the defendant's prosecution); Re Argoud, 1964 Bull. Crim. No. 420, 45 Int'l L. Rep. 90 (Cour de Cassation June 4, 1964) (forcible abduction from Germany; protest arrived late).

injured State has demanded, and the wrongdoing State has agreed, to the return of the victim. It is important to stress the unanimity of practice and doctrine on this point, for it has often been doubted whether international law recognizes the remedy of restitution in kind. . . . This view is clearly without foundation . . . ." Mann at 411.[6/]

6/ E.g., Jacob Case (1935), in Preuss, Settlement of the Jacob Kidnapping Case, 30 Am. J. Int'l L. 123 (1936) (Germany released a German seized in Switzerland, after Switzerland initiated arbitration under a Swiss-German treaty); In Re Jolis, 2 S. Jur. II 105 (1934), 7 Ann. Dig. 191 (Tribunal Correctionel d'Avesnes, France, July 22, 1933) (arrest in Belgium by French police; Belgian Government protested to the French Government and demanded the return of the individual); Matter of Nollet, Journal du Droit Int'l 1188 (Cour d'appel de Douai 1891) (arrest in Belgium by French police). See generally 1 M. Bassiouni, International Extradition: United States Law and Practice, ch. V, § 5.4, at 234-37 (2d rev. ed. 1987)
Continued

"The United States has repeatedly associated itself with the view that unconsented arrests violate the principle of territorial integrity." House Oversight Hearing at 32 (prepared statement of Hon. Abraham Sofaer). The Office of Legal Counsel ("OLC") in the U.S. Department of Justice endorsed it in a formal 1980 opinion to the Attorney General when asked about the legality of a proposed forcible abduction by the FBI. Extraterritorial Apprehension by the Federal Bureau of Investigation, 4B Op. Off. Legal Couns. 543 (1980) (the "OLC Opinion"), reprinted in House Oversight Hearing at 75. The OLC concluded "it appears to be the case that a forcible abduction, when coupled with a protest by the asylum state, is a violation of international law. It is

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(collecting cases).

regarded as an impermissible invasion of the territorial integrity of another state." OLC Opinion at 549 (citing United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir.), cert. denied, 421 U.S. 1001 (1975)).

Although the Department of Justice later retracted the OLC Opinion and issued a new, unpublished one, it did so for reasons entirely unrelated to the recognition of the proscription, under customary international law, on forcibly abducting a person from another sovereign state over its protest. According to then-Assistant Attorney General William Barr and State Department Legal Adviser Sofaer, the OLC issued the new opinion to assert (1) the authority of Congress and the President, under U.S. law, to violate customary international law; (2) the authority of the FBI, under its enabling statutes, to

conduct forcible abductions without the express or implied consent of the foreign state; and (3) the authority of the United States, under international law, to undertake certain forcible abductions as a matter of self-defense. House Oversight Hearing at 2-21 (statement of William Barr); id. at 22-42 (statement of Hon. Abraham Sofaer).

In the present case, we do not understand the Government to justify the abduction of Alvarez-Machain under customary international law as a matter of national self-defense. "The evidence of imminent harm from [drug] traffickers' threats would have to be strong to sustain a self-defense argument." Id. at 24 (statement of Hon. Abraham Sofaer). "[T]here would have to be specific acts or dangers that amounted to an attack on the United States under

the U.N. Charter . . . ." Id. at 68 (same). And, as discussed below at 26-47, none of the bases under U.S. law to displace the customary international law proscription on forcible abduction applies here.

Moreover, whatever the minimum level of protest might be necessary to trigger this customary international law remedy of repatriation, it has surely been met in the present case. The diplomatic note dated May 16, 1990 from the Embassy of Mexico to the State Department plainly stated that the forcible abduction of Alvarez-Machain "violate[d] both the mexican Constitutional Law, as well as International Law" and demanded his return to Mexico to stand trial, if the facts warranted, under Mexican law. J.A. at 35-36. The Mexican Secretaria de Relaciones Exteriores Consulada General repeated these views

directly to the court of appeals in a letter dated November 9, 1990. Id. at 67-71. Based on these documents, the court of appeals correctly found "there remains no question about the adequacy of Mexico's protests in this case or about Mexico's demand for repatriation." United States v. Alvarez-Machain, 946 F.2d 1466, 1467 (9th Cir. 1991). Compare United States v. Verdugo-Urquidez, 939 F.2d 1341, 1360 & n.22 (9th Cir. 1991) (finding sufficient protest on the record), petition for cert. pending, No. 91-670, with id. at 1364-69 (Browning, J., concurring but advocating remand to determine adequacy of protest).

III. THE CUSTOMARY INTERNATIONAL LAW PROHIBITION ON FORCIBLE ABDUCTION IS ENFORCEABLE IN U.S. COURTS

As shown above, customary international law forbids one state from

forcibly abducting a person from another state, without its express or implied consent; when that state protests, customary international law requires the abducting state to return him; and, thus, on the facts of this case, the United States is obligated to return Alvarez-Machain to Mexico. In this section, we discuss why Alvarez-Machain can invoke these rules in federal court.

A. The Prohibition Is Law of the United States, and Is Not Displaced by the Ker-Frisbie Doctrine or Otherwise

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900). Unlike treaties, which may

require implementing legislation to become enforceable in U.S. courts, see Foster v. Neilson, 27 U.S. (2 Pet.) 253, 298 (1829), customary international law is self-executing. In other words, as a starting proposition, customary international law is enforceable in U.S. courts and, like federal common law, is supreme to state law. Restatement §§ 111(1), (3). See also, e.g., Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116-17 (Pa. 1784) (defendant held liable under customary international law for assault on French diplomat); Talbot v. Janson, 3 U.S. (3 Dall.) 133, 161 (1795) (international law creates a domestic cause of action in seizure of foreign vessel in international waters); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 451-53 & nn.14-15 (1964) (White, J., dissenting) (collecting cases).

This is not to say that customary international law is necessarily supreme to other sources of federal law applicable in U.S. courts. Customary international law "will not be given effect as law in the United States if it is inconsistent with the United States Constitution." Restatement § 115(3). And in regard to other sources of federal law, this Court explained in The Paquete Habana that international law applies if "there is no treaty, and no controlling executive or legislative act or judicial decision." 175 U.S. at 700. (Of course, any such act or decision must itself be consistent with the Constitution.) In the present case, the customary international law prohibition on forcible abduction is neither "inconsistent" with the Constitution nor displaced by any of the four potential

sources of federal law listed in The Paquete Habana.

1. The 1980 Extradition Treaty

Whether or not the 1980 Extradition Treaty prohibits forcible abduction, it certainly creates no right, expressly or by implication, to do it. See Air France v. Saks, 470 U.S. 392, 397 (1985); Restatement § 325(1) (a treaty is "to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose"). That being so, the treaty does not displace the general rule of customary international law prohibiting forcible abduction.

2. "Controlling . . . Legislative Act"

Likewise, Congress did not authorize the Drug Enforcement Administration ("DEA") or its agents forcibly to abduct

persons charged with the crimes for which Alvarez-Machain is indicted. Insofar as U.S. courts are concerned, Congress has the Constitutional power to authorize forcible abduction, and such legislation would be "controlling," under The Paquete Habana, to displace any conflicting rule of customary international law. See Tag v. Rogers, 267 F.2d 664, 668 (D.C. Cir. 1959), cert. denied, 362 U.S. 904 (1960); Restatement §115(1)(a). But "[w]hile Congress and the President have the power to depart from international law, the courts have in effect insisted that they do so unambiguously and deliberately. This doctrine reflects how our nation's respect for international law is built into our domestic legal system, and the high value accorded that law in theory and practice." House Oversight Hearing at 30 (statement of Hon. Abraham

Sofaer). "Therefore, unless there is 'the affirmative intention of the Congress clearly expressed,' we must presume [a statute] 'is primarily concerned with domestic conditions.'" Equal Employment Opportunity Commission v. Arabian American Oil Co., 111 S. Ct. 1227, 1230 (1991) ("EEOC") (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957), and Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).7/

7/ See, e.g., Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains"); Commodities Futures Trading Comm'n v. Nahas, 738 F.2d 487, 493 (D.C. Cir. 1984) ("To construe 7 U.S.C. § 15 as empowering the district court to enforce an investigative subpoena served on a foreign citizen in a foreign nation would seriously impinge on principles of international law."); Federal Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1323 (D.C. Cir. 1980)
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At this juncture, it is important to distinguish between prescriptive jurisdiction (i.e., "the authority of a state to make its law applicable to persons or activities") and enforcement jurisdiction (i.e., "the authority of a state to use the resources of government to induce or compel compliance with its law"). Restatement Part IV Introductory Note. The criminal statutes under which Alvarez-Machain has been indicted are wholly prescriptive: committing violent acts in aid of racketeering (18 U.S.C. §

("Given the plain intrusion upon French national sovereignty resulting from the FTC's direct service of its compulsory process abroad and the violation of international law which would result if the district court were to enforce the subpoena here, the only issue is whether the provisions which governed subpoena service within the FTC Act at the time of the challenged service could have been sensibly construed so as to avoid conflict with international law.") (footnotes omitted); Restatement § 114.

1959) and conspiring to do so (18 U.S.C. § 371), kidnapping a federal agent and conspiring to do so (18 U.S.C. §§ 1201(c) and 1201(a)(5)), and murdering a federal agent (18 U.S.C. § 1111). These statutes do not, by themselves, authorize any extraterritorial enforcement measures such as forcible abduction.

The sole grant of enforcement jurisdiction to the DEA, 21 U.S.C. § 878(a), is silent as to extraterritorial application and thus, under EEOC, cannot be read to authorize forcible abduction in violation of customary international law. That statute provides:

> Any officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General may--
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> (1) carry firearms;
>
> (2) execute and serve search warrants, arrests warrants, administrative inspection warrants,

> subpoenas, and summonses issued under the authority of the United States;
>
> (3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;
>
> (4) make seizures of property pursuant to the provisions of this subchapter; and
>
> (5) perform such other law enforcement duties as the Attorney General may designate.

To the extent Congress has expressly addressed extraterritorial enforcement by the DEA, it has been to restrict such activity: "No officer or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts." 22 U.S.C. § 2291(c)(1). See Senate Foreign Relations Comm., Internal Security Assistance and Arms Export Control Act

of 1976: Report on S. 2662, S. Rep. No. 605, 94th Cong., 2d Sess. 54-55 (1976) (declaration of committee intent regarding 22 U.S.C. § 2291(c)(1)). When Congress intends to displace customary international law with respect to enforcement jurisdiction, it does so plainly. E.g., Section 3202(d) of the Maritime Drug Law Enforcement Prosecution Improvements Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-96, (codified as amended at 46 U.S.C. app. § 1903(d)) ("A claim of failure to comply with international law in the enforcement of this Act may be invoked by a foreign state, and a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this Act.").

3. "Controlling Executive . . . Act"

Nor has there been in this case any "controlling executive . . . act" in the sense required by The Paquete Habana, as the facts of that case make clear. There, this Court sat as a prize court with jurisdiction over two fishing boats captured during the Spanish-American War. With an extensive review of the evidence of international law, the Court concluded that "[b]y an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war." 175 U.S. at 686. "This rule of international law is one which prize courts, administering the law of

nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter." Id. at 708. On the facts, the relevant "public acts" were a Presidential Proclamation to institute a naval blockade "in pursuance of the laws of the United States, and the law of nations applicable to such cases," and an authorization from the Secretary of the Navy to the fleet admiral to seize vessels "attempting to violate blockade" and to detain "any such vessel or crew considered likely to aid enemy." Id. at 712-13. Since both vessels seized were coastal fishing vessels and neither attempted to violate the blockade nor was likely to aid the enemy, the Court enforced the customary international law of prize and held the Government liable for the seizures. Id. at 713-14. In

short, "the decision in [The Paquete Habana] found no controlling Executive Act, affirmed the relevance of international law to the conduct of Executive Branch officials, and disallowed an action by a lower official because it violated international law." House Oversight Hearing at 27 (prepared statement of Hon. Abraham Sofaer).

That the Court addressed the merits in The Paquete Habana rebuts any argument that the present case poses a nonjusticiable "political question." Cf. Pet. Br. at 38-41. All a court need determine in a forcible abduction case is (a) whether there was a violation of customary international law (i.e., the fact of the abduction, state responsibility for it, and adequate protest from the aggrieved state), and if there was (b) whether, in the circumstances of the case, that law is

displaced by any contrary treaty or "controlling executive or legislative act or judicial decision." 175 U.S. at 700. The fact that Congress and the President have the power to displace customary international law means that cases where neither of them have exercised that power present no separation of powers concerns, see Banco Nacional de Cuba, 376 U.S. at 427-37, or "political questions," see Baker v. Carr, 369 U.S. 186, 211-12, 217 (1962).

In the present case, the relevant "executive act" was the authorization by DEA Agent Hector Berrellez to Antonio Garate-Bustamante "to tell his associates that, in return for the delivery of respondent to the DEA's custody in the United States, the DEA would pay a $50,000 reward plus expenses." Pet. Br. at 3. This was not an act done at sufficient seniority in

the Executive Branch to displace customary international law. Cf. Garcia-Mir v. Meese, 788 F.2d 1446, 1454 (11th Cir.) ("there was such a controlling act in the Attorney General's termination of the status review plan [concerning a class of Cuban refugees] and in his decision to incarcerate indefinitely pending efforts to deport"), cert. denied, 479 U.S. 889 (1986); House Oversight Hearing at 68 (statement of Assistant Attorney General Barr that there would be "presidential consideration" of any proposed forcible abduction by the FBI without foreign state consent).

Moreoever, we do not understand the Government to argue that the Executive Branch in this case ever chose to disregard customary international law, but rather to argue that there was no violation. This justification fails to

meet the plain statement rule the courts have required of both Congress and the President to displace customary international law. The plain statement rule is particularly important to enforce against the Executive Branch, for "[u]nlike Congress, the President has no general authority to make law that might compete with international law as law of the United States." Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny, 100 Harv. L. Rev. 853, 879 (1987) (Presidential authority to displace customary international law might be grounded in the foreign affairs powers of Article II, but not in the Article II, § 3 directive to "take Care that the Laws be faithfully executed").

4. The Ker-Frisbie Doctrine

This leaves the fourth factor under The Paquete Habana, whether there is a "controlling . . . judicial decision" displacing customary international law. To be sure, this Court and various lower courts have held that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" Frisbie v. Collins, 342 U.S. 519, 522 (1952). See also Ker v. Illinois, 119 U.S. 436, 444 (1886); The Merino, 22 U.S. (9 Wheat.) 391, 402-03 (1824) (ship seizure); The Ship Richmond v. United States, 13 U.S. (9 Cranch) 102, 104 (1815) (ship seizure); Restatement § 433. However, none of the cases applying this Ker-Frisbie rule have involved the exact fact pattern

presented here: a forcible abduction, without the express or implied consent of the foreign state and indeed causing it to protest, at the behest of the U.S. Government. Frisbie, for instance, arose from an interstate abduction within the United States and thus presented no question of customary international law.[8/] In Ker, The

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8/ See also, e.g., New York v. Harris, 110 S. Ct. 1640, 1643 (1990); Immigration and Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1038-1039 (1984); United States v. Crews, 445 U.S. 463, 474 (1980); Stone v. Powell, 428 U.S. 465, 485 (1976); Gerstein v. Pugh, 420 U.S. 103, 119 (1975); Pettibone v. Nichols, 203 U.S. 192, 207-208 (1906); Lascelles v. Georgia, 148 U.S. 537, 543 (1893); Cook v. Hart, 146 U.S. 183, 192 (1892) (all applying Ker-Frisbie to domestic seizures). The Brief for Respondent discusses the decisions of this Court distinguishing seizures in the domestic and international contexts. See, e.g., Nevada v. Hall, 440 U.S. 410, 425 (1979) (Extradition Clause of Article IV "demonstrate[s] that ours is not a union of 50 wholly independent sovereigns").

Merino, and The Ship Richmond, there was no state protest and thus no obligation under customary international law for the United States to return the person and ships seized, respectively.[9/] In

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9/ See Ker v. People, 110 Ill. 627, 640 (1884) ("If the government of Peru does not complain of the arrest of defendant within its jurisdiction, as an infraction of international law, it does not lie in the mouth of defendant to make complain on its behalf."), aff'd, 119 U.S. 436 (1886). See also, e.g., Matta-Ballesteros v. Henman, 896 F.2d 255, 260 (7th Cir.) ("Without an official protest, we cannot conclude that Honduras has objected to Matta's arrest. Therefore Matta's claims of violations of international law do not entitle him to relief."), cert. denied, 111 S. Ct. 209 (1990); United States v. Toro, 840 F.2d 1221, 1235 (5th Cir. 1988) ("neither party to the treaty has objected"); United States v. Zabeneh, 837 F.2d 1249, 1261 (5th Cir. 1988) ("Because neither Guatemala nor Belize protested appellant's detention and removal to the United States, appellant lacks standing to raise the treaties as basis for challenging the court's jurisdiction"); United States v. Cordero, 668 F.2d 32, 38 (1st Cir. 1981) (neither "Panama [n]or

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addition, in Ker it is unclear at best whether the U.S. Government authorized the abduction. See 119 U.S. at 438, 442-43 (the abductor was only directed to receive Ker from Peruvian authorities in compliance with the extradition treaty). When there is no state responsibility, as when the abductors

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Venezuela objected to appellants' departure from their territories"); United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981) ("The Bahamian government has not sought his return or made any protest"); Waits v. McGowan, 516 F.2d 203, 208 & n.9 (3d Cir. 1975) ("The pleadings do not allege that Canada has objected in any way to the removal of Waits to this country"); United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir.) ("the failure of Bolivia or Argentina to object to Lujan's abduction would seem to preclude any violation of international law which might otherwise have occurred"), cert. denied, 421 U.S. 1001 (1975); United States v. Unverzagt, 299 F. 1015 (W.D. Wash. 1924), aff'd sub nom. Unverzagt v. Benn, 5 F.2d 492 (9th Cir.), cert. denied, 269 U.S. 566 (1925) (no indication that Canada protested forcible abduction); State v. Brewster, 7 Vt. 118, 120-21 (1835) (same).

are private "bounty hunters" acting outside the scope of any actual state authority, the courts have retained jurisdiction.[10] Likewise several of the cases relying on Ker and Frisbie involved abductions occurring on the high seas, so there was no violation of foreign sovereignty.[11] Finally, a large number of cases were de facto

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10/ See, e.g., Kear v. Hilton, 699 F.2d 181, 184 (4th Cir. 1983) (abduction from Canada); Ex parte Lopez, 6 F. Supp. 342, 344 (S.D. Tex. 1934) (abduction from Mexico); Letter from Robert Bacon, Acting Secretary of State to the Mexican Charge (June 22, 1906), reprinted in H.R. Doc. No. 1, Part 2, 59th Cong., 2d Sess. 1121-22 (1909) (the Martinez incident).

11/ E.g., United States v. Yunis, 681 F. Supp. 891 (D.D.C. 1988), rev'd on other grounds, 859 F.2d 953 (D.C. Cir. 1989) (forcible abduction of Jordanian by U.S. military in international waters); United States v. Postal, 589 F.2d 862, 865 (5th Cir.), cert. denied, 444 U.S. 832 (1979) (search and seizure by Coast Guard of ship registered in the Grand Cayman Island, in international waters).

extraditions by officials of a foreign state, acting within the scope of their official duties.[12/]

12/ See, e.g., United States v. Kaufman, 858 F.2d 994, 1006 (5th Cir. 1988) ("The Franks brothers were arrested in Chetumal, Mexico, on July 24, 1986, by DEA agents and Mexican federal judicial police"); United States v. Verdugo-Urquidez, 856 F.2d 1214, 1215 (9th Cir. 1988) ("Verdugo-Urquidez's presence in the United States is the result of his arrest by Mexican police officers in Mexico and his delivery by them, across the border, into the waiting arms of the United States government."), rev'd on other grounds, 494 U.S. 259 (1990); United States v. Toro, 840 F.2d 1221, 1229 (5th Cir. 1988) ("The Panamanian authorities released the four men into Spasaro's custody at Howard Air Force Base on April 2, and Spasaro then placed the men on a DEA plane bound for Houston, where arrest warrants issued on March 2, 1986, were formally executed."); United States v. Matta-Ballesteros, 700 F. Supp. 528, 532 (N.D. Fla. 1988) ("Indeed, it appears that authorities of Honduras either seized and removed the defendant from their country or aided and acquiesced in his removal."); United States v. Evans, 667 F. Supp. 974, 979 (S.D.N.Y. 1987) (deportation by Bermuda authorities); United States v.

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Contrary to the Government's assertion, the application of the

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Rosenthal, 793 F.2d 1214, 1230 (11th Cir. 1986) ("Rosenthal was arrested on September 27, 1983, pursuant to an expulsion order issued by Colombian authorities."), cert. denied, 480 U.S. 919 (1987); United States v. Cordero, 668 F.2d 32, 35 (1st Cir. 1981) ("The Panamanians arrested the four and held them in jail. They were then sent by air to Venezuela, and then were sent on to Puerto Rico."); United States v. Fielding, 645 F.2d 719, 723-24 (9th Cir. 1981) (expulsion of American by Peruvian officials); United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980) ("Thailand initiated, aided and acquiesced in Valot's removal to the United States"); United States v. Marzano, 537 F.2d 257, 270 (7th Cir. 1976), ("Tricker took the defendants into custody for various infractions of Grand Cayman law and asked the defendants to board a plane bound for Miami after determining that the FBI was willing to pay the cost of defendants' airfare."), cert. denied, 429 U.S. 1038 (1977); United States v. Lovato, 520 F.2d 1270, 1272 (9th Cir.) (per curiam) (allegations that expulsion, apparently of an American, by Mexican Army personnel "amount[ed] to little more than the scenario of a routine expulsion by Mexican officers of an undesirable alien"), cert. denied, 423 U.S. 985 (1975); United States v. Cotten, 471

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customary international law prohibition on forcible abduction would not "immuniz[e] a defendant from all prosecution." Pet. Br. at 17. In the present case, were the court of appeals to be affirmed and Alvarez-Machain repatriated, the Mexican Government could extradite him to the United States either under the 1980 Extradition Treaty pursuant to a proper request, or outside the treaty if permitted under Mexican law. Alternatively, the Mexican government could prosecute him itself, which it is willing to do. See J.A. at 70-71.

F.2d 744 (9th Cir.), cert. denied, 411 U.S. 936 (1973) (expulsion of Americans by Vietnamese officials); Stevenson v. United States, 381 F.2d 142, 144 (9th Cir. 1967) ("the appellants were deported by Mexican immigration authorities as undesirable aliens found in Mexico under suspicious circumstances"); United States v. Sobell, 244 F.2d 520, 524-25 (2d Cir.), cert. denied, 355 U.S. 873 (1957) (rendition from Mexico by Mexican police).

In either case, Alvarez-Machain would enjoy no "immunity" from prosecution. The sole question before this Court is whether to uphold the sovereign right of the Mexican Government to make that choice.

B. Alvarez-Machain Has Standing to Assert the U.S. Violation of Customary International Law as a Defense to Personal Jurisdiction

By being forcibly abducted from Mexico to face criminal charges in the United States, Alvarez-Machain clearly meets Article III requirements for standing: "'he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the [Government],' . . . the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" Valley Forge Christian College v. Americans United

for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (citations omitted).

To be sure, the assertion of the customary international law proscription on forcible abduction raises the prudential concern that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Id. at 474. Neither policy animating that concern applies here. One is that "the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." Singleton v. Wulff, 428 U.S. 106, 113-14 (1976). The Mexican Government clearly wishes to assert its right under

customary international law to have Alvarez-Machain repatriated. It most likely will not be able to enjoy this right if Alvarez-Machain is denied standing, for the extraordinary measures the DEA took to seize him imply that the agency has no intention to negotiate his release. See United States v. Caro-Quintero, 745 F. Supp. 599, 601-03 (C.D. Cal. 1990) (describing events leading up to the abduction).

The second policy is that "third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them." Singleton, 428 U.S. at 114. This requires determining whether "the third party can reasonably be expected properly to frame the issues

and present them with the necessary adversarial zeal." Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984). In forcible abduction cases, this requirement should virtually never restrict standing because the sole issues to be framed, as Alvarez-Machain has done here, are the fact of the abduction, U.S. responsibility for it, and adequate protest from the aggrieved state. In addition, he is "the right's best available proponent," Singleton, 428 U.S. at 116, as it is difficult to see how the Mexican Government would be able to bring its own action in federal court to enforce its sovereign rights. See Restatement § 902 (interstate claims and remedies).

Contrary to the Government's assertion, Pet. Br. at 36-37, the fact that states typically have diplo-

matically settled disputes arising from forcible abduction does not mean Alvarez-Machain lacks standing. This is so because the Mexican diplomatic protest that establishes the international obligation of the United States to return Alvarez-Machain also satisfies the prudential concern for jus tertii standing in federal courts. Thus, as the Government notes, id. at 36, the Mexican Government could withdraw its protest -- either because it reached a diplomatic settlement or for any other or no reason -- and Alvarez-Machain would thereby lose his standing to assert the violation of Mexican sovereignty.

Third-party standing to raise customary international law as a defense to criminal prosecution is hardly new to U.S. jurisprudence. In particular, courts have long allowed diplomats

third-party standing to enforce diplomatic immunity, well before the adoption of express provisions to that effect in the Vienna Convention on Diplomatic Relations, T.I.A.S. 7502, 23 U.S.T. 3227 (entered into force in U.S. Dec. 13, 1972). See, e.g., Dupont v. Pichon, 4 U.S. (4 Dall.) 321 (1805) (allowing French chargé d'affaires to plead diplomatic immunity as defense to imprisonment in action on official debt); Restatement Ch. 6. Like the prohibition on forcible abduction, diplomatic immunities "are not the personal rights of the individual agent, but are conferred by international law on the sending state," which may waive them. Restatement § 464 comment j. See Davis v. Packard, 32 U.S. (7 Pet.) 276, 284 (1833); see generally United States v. Enger, 472 F. Supp. 490, 504-006 (D.N.J. 1978) (history of customary

international law of diplomatic immunity); 7 M. Whiteman, Digest of International Law § 43, at 421-36 (1970) (surveying state practice).

CONCLUSION

The forcible abduction of Alvarez-Machain from Mexico, at the behest of the U.S. Government and leading to a formal diplomatic protest from the Mexican Government, violated customary international law, which requires that he be returned. These principles of customary international law are U.S. law and are not displaced by the Ker-Frisbie doctrine or otherwise. The judgment of the court of appeals should be affirmed.

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